1992

Ellen Anderson, as Personal Representative of the Estate of D.C. Anderson, Dan Scott, Ellen Anderson, personally, and Jeanne Scott v. Eugene E. Doms and Michael R. McCoy: Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ELLEN ANDERSON, as Personal, Representative of the Estate of D.C. Anderson, DAN SCOTT, ELLEN ANDERSON, personally, and JEANNE SCOTT,	:	
Plaintiffs/Appellants and Cross-Appellees,	:	Case No. 920653-CA
vs.	:	
EUGENE E. DOMS and MICHAEL R. MCCOY,	:	Priority No. 15
Defendants/Appellee and Cross-Appellant.	:	

REPLY BRIEF OF CROSS-APPELLANT

An appeal from a final judgment in the Third Judicial District Court, in and for Summit County, State of Utah, the Honorable John A. Rokich, presiding.

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REPLY TO PLAINTIFFS' RESPONSE TO STANDARDS OF REVIEW AND STATEMENT OF FACTS

In their response brief, Plaintiffs erroneously assert that Doms' opening brief misstates the standards of appellate review in regard to Doms' six major issues as Cross-Appellant. However, Plaintiffs fail to point out a single instance in which the standards set forth in Doms' opening brief are incorrect. Contrary to Plaintiffs' assertions, issues 1, 3, 5 and 6 do present arguments based primarily on questions of law, and in some instances, mixed questions of law and fact. Issues 2 and 4 clearly present questions of law only.

Plaintiffs have also attempted to set up a smoke screen by inappropriately categorizing Doms' arguments as challenging the trial court's Findings of Fact. As will be pointed out in detail, infra, Doms is challenging the trial court's legal rulings and Conclusions of Law in regard to Doms' issues, not the Findings of Fact. Plaintiffs are attempting to place upon Doms the heavy burden of marshaling all of the evidence in support of the Findings of Fact and demonstrating they are clearly erroneous. Doms has not failed to marshal the evidence supporting the trial court's Findings of Fact because Doms is not challenging the Findings of Fact. In each of the six points, infra, it will be established that the trial court committed errors of law, and its Conclusions of Law and Judgment are not supported by its own Findings of Fact and the uncontradicted evidence in the record.

Plaintiffs also erroneously assert that Doms has misstated relevant facts in his "Statement of Facts." This is another totally baseless assertion by Plaintiffs, who subsequently fail to point

out a single instance where any of the facts set forth in Doms' opening brief are incorrect. On the contrary, every fact set forth under Doms' "Statement of Facts" and throughout his opening brief is either a direct Finding of Fact by the trial court or is based upon uncontradicted evidence in the record.

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY APPLYING THE EQUITABLE DOCTRINE OF LACHES AND REFUSING TO RESCIND THE ROSSI HILLS TRANSACTION.

A. Doms has not challenged the trial court's pertinent Findings of Fact regarding rescission and laches as clearly erroneous.

In Point I of their response brief as Cross-Appellees, Plaintiffs set forth, in whole or in part, 12 of the 15 Findings of Fact by the trial court regarding the issues of Doms' right to rescission of the Rossi Hills transaction and application of the doctrine of laches.[1] Findings of Fact 33-47 are the 15 Findings of Fact originally set forth in the trial court's Memorandum Decision denying rescission on the basis of laches (R. 4188-95; Add. 21 to Doms' op. br.).

After setting forth 12 of these Findings of Fact (and conveniently omitting several other pertinent Findings of Fact), Plaintiffs make the baseless, blanket assertion that Doms' arguments regarding his right to rescission are attacks on these Findings of the trial court, and are supported only be evidence which is contradictory to these Findings. Plaintiffs then conclude their erroneous argument with the assertion that the trial court's ruling denying rescission should be

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[1] All arguments and references in this reply brief to the arguments of Plaintiffs are to Points I-VI of Plaintiffs' response brief as Cross-Appellees. References in parentheses to Doms' opening brief are abbreviated "op. br." References to Findings of Fact (F. of F.), Conclusions of Law (C. of L.), and Judgment (Judg.) are to the trial court's final Second Amended Findings of Fact and Conclusions of Law (R. 6874-99; Add. 1 to Doms' op. br.) and Second Amended Judgment (R. 6900-07; Add. 2 to Doms' op. br.).

affirmed because Doms has not marshaled the evidence to demonstrate the trial court's Findings of Fact are clearly erroneous.

Plaintiffs' argument is a subterfuge and fails for the obvious reason that Doms has not challenged the trial court's pertinent Findings of Fact regarding rescission and laches. In Point I of his opening brief, Doms argues that he is entitled to rescission of the Rossi Hills transaction notwithstanding the trial court's Findings of Fact regarding Doms' knowledge of the loop road and other encroachments on the property prior to the sale in March of 1982. Contrary to their unsubstantiated assertions, Plaintiffs have failed to point out a single specific Finding of Fact which Doms is alleged to be attacking, nor have Plaintiffs pointed out a single piece of evidence which Plaintiffs allege should have been marshaled. Furthermore, Plaintiffs have failed to point out a single piece of evidence relied upon by Doms which contradicts the pertinent Findings of Fact by the trial court regarding rescission and laches.

B. The trial court's pertinent Findings of Fact and the uncontradicted evidence establish Doms' right to rescission and preclude application of laches.

Findings of Fact 33-39 are based on uncontradicted evidence in the record, and Doms does not challenge any of these Findings. Furthermore, none of these seven Findings of Fact relate directly to application of the doctrine of laches against Doms, except for Finding of Fact 35, which Plaintiffs conveniently fail to discuss. In Finding of Fact 35, the trial court found as follows:

> *35. Both Sloan and Anderson represented that the property was a prime piece of development property and its highest and best use would be as an integrated development with the two adjoining parcels referred to as Block 62 and the Slipper parcel.*

It is readily apparent why Plaintiffs ignore Finding of Fact 35. These were misrepresentations of material facts by D.C. Anderson and his agent, Mike Sloan, which Doms relied upon and induced him to purchase Rossi Hills. The uncontradicted evidence in the record

establishes that Anderson and Sloan either intentionally or negligently failed to tell Doms that Plaintiffs' attempts at the three-parcel development had previously failed because the owners of Block 62 felt there were legal encumbrances on Rossi Hills which would prevent development of a significant portion of the property (R. 7437-38, 7481-82, 7484, 7593-94, 7603-04). The uncontradicted evidence also establishes that Plaintiffs and Sloan failed to tell Doms that the three-parcel development had already been submitted for preliminary approval to Park City and rejected (R. 7556). The uncontradicted evidence also establishes that the proposed three-parcel development could not have been built under the Park City ordinances in effect at that time, but Sloan and D.C. Anderson told Doms that the development could be built (R. 7417-18, 7617). Plaintiffs and Sloan were well aware of the loop road and encroachments on Rossi Hills when they sold it to Doms (F. of F. 14) and, in fact, D.C. Anderson and Dan Scott had owned Rossi Hills for approximately 16 years prior to this time (R. 2724, pp. 21-24).

These material misrepresentations and others are set forth with particularity on pages 21-22 of Doms' opening brief. Thus, the uncontradicted evidence in the record clearly establishes that the representations made by Sloan and Anderson in Finding of Fact 35 were false, and that Sloan and Anderson either knew or should have known that these representations were false. Rossi Hills was not a "prime piece of development property," and the integrated development with Block 62 and the Slipper parcel had already fallen apart because of the position taken by the Block 62 principals regarding the encroachments on the property.

Another absolutely critical Finding of Fact by the trial court which supports Doms' right to rescission and precludes application of the doctrine of laches against Doms is Finding of Fact 42. This Finding is also completely ignored by Plaintiffs. In Finding of Fact 42, the trial court found as follows:

42. Mr. Sloan informed Defendant Doms that the encroachments would not affect development and an access road to the property would be in the same place as the loop road.

This Finding by the trial court is based on the testimony of Sloan himself at trial (R. 7668, 7683-84). The representation by Sloan to Doms that the encroachments would not affect development of the property is an undisputable misrepresentation of a material fact, which Doms relied upon and induced him to purchase Rossi Hills.

Plaintiffs argue that the above-mentioned misrepresentations, and those additional misrepresentations set forth on pages 21-22 of Doms' opening brief, do not "rise to the level" of being "material misrepresentations." However, this statement is the sum total of Plaintiffs' entire argument in regard to these misrepresentations. Plaintiffs do not present a single argument to support their unsubstantiated assertion.

A "material fact" is one "which a buyer or seller of ordinary intelligence and prudence would think to be of some importance in determining whether to buy or sell." S&F Supply Co. v. Hunter, 527 P.2d 217, 221 (Utah 1974). See also RESTATEMENT (SECOND) OF CONTRACTS § 162(2). The misrepresentations by D.C. Anderson and Sloan set forth in Findings of Fact 35 and 42, and those set forth on pages 21-22 of Doms' opening brief, are clearly misrepresentations of facts which a buyer of ordinary intelligence and prudence would think to be of some importance in determining whether to buy. Therefore, these misrepresentations constitute misrepresentations of material facts, and Plaintiffs' unsubstantiated assertion to the contrary is clearly erroneous.

In Finding of Fact 40, the trial court concluded as follows:

40. Doms knew or should have known at the time he purchased the Rossie [sic] Hills Property and the Slipper parcel that the integrated development of the three parcels had failed because of the problems with the Rossie [sic] Hills

property and the inability of the parties to reach an agreement as to credits for each parcel.

In Gillmor v. Wright, 850 P.2d 431, 433 (Utah 1993), the Utah Supreme Court set forth the following standard:

> On appeal, we disregard the labels attached to findings and conclusions and look to the substance. (citations omitted). Therefore, that which a trial court labels a "finding of fact" may be in actuality a conclusion of law, which we review for correctness. (citations omitted).

The trial court's statement in Finding of Fact 40 that Doms *knew or should have known* why Plaintiffs' attempt at the three-parcel development had failed is a Conclusion of Law, not a true Finding of Fact. Furthermore, it is an erroneous Conclusion of Law based upon the trial court's opinion that it was "unbelievable" that Doms did not investigate and determine exactly why Plaintiffs had not concluded the three-parcel development (see pp. 4-5 of Memorandum Decision denying rescission; Add. 21 to Doms' op. br.).

This opinion demonstrates the trial court's misunderstanding of Utah law. Doms had no legal obligation to make such an investigation. On the contrary, Doms was entitled to rely on the positive assertions by Anderson and Sloan regarding Rossi Hills and its development potential with Block 62 and the Slipper parcel. Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980); Despain v. Despain, 855 P.2d 254, 257 (Utah App. 1993). The trial court's own Findings of Fact 35 and 42, and the uncontradicted evidence in the record, establish that Doms did not know at the time he purchased Rossi Hills and the Slipper parcel that the three-parcel development had failed due to the "problems" with the property because Anderson and Sloan had duped and deceived Doms by telling him there were no problems.

Sloan, as a licensed real estate broker and agent, breached his duty under Utah law to disclose material facts to Doms; and Sloan's failure to tell Doms that the three-parcel development had previously failed because of the encroachments on Rossi Hills constitutes a

material misrepresentation. Dugan v. Jones, supra, at 615 P.2d 1248.[2] Moreover, Doms had a right under Utah law to repose confidence in Sloan's competence, knowledge and honesty in regard to Rossi Hills. Id.

In Findings of Fact 41 and 43, the trial court found as follows:

> *41. Doms walked the Rossie [sic] Hills property with Mr. Sloan in the fall of 1981 and knew that there were roads and sheds on the property.*
>
> . . .
>
> *43. Doms had actual notice of the easement encroachments for the first time sometime between October 22, 1981, and November 7, 1981, and had further notice during 1982 and up and through 1984.*

Findings of Fact 41 and 43 are based solely on Sloan's testimony that he walked the property with Doms in October or November of 1981 (R. 7650-68). Contrary to Plaintiffs' assertions, Doms does not challenge these Findings on appeal.[3]

Finding of Fact 43 may need some clarification so that there will be no misunderstanding in regard to the actual findings of the trial court. The trial court's use of the term "easement encroachments" in Finding of Fact 43 does not mean, and was not intended to mean, that Doms

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[2] See also Secor v. Knight, 716 P.2d 790, 795 (Utah 1986); First Security Bank v. Banberry Development, 786 P.2d 1326, 1329-33 (Utah 1990).

[3] Doms argued to the trial court that Sloan's testimony in this regard was false, inherently unbelievable, and that Sloan was either mistaken or simply did not tell the truth (see Doms' "Trial Brief Regarding Issue of Laches" (R. 5101-42; Add. 22 to Doms' op. br.)). Doms repeatedly testified at trial that although he viewed the general area of Rossi Hills from some distance in the late fall of 1981, there was snow on the ground at that time, and he did not walk nor personally inspect the property with Sloan or anyone else prior to the closing which occurred in March of 1982 (R. 7144-45, 7147, 7294, 7427-30, 7449-51, 7688-89). Sloan's testimony at trial in regard to walking the property with Doms and what he allegedly told Doms at that time was inconsistent and/or contradictory to his deposition testimony (R. 454). Moreover, Sloan admitted in his testimony at trial that it was possible he was mistaken and that he could have walked the property with one of several other people at that time rather than Doms (R. 7680). However, because of the deference accorded to the finder of fact to determine the credibility of witnesses, Doms is not challenging Findings of Fact 41 and 43. Doms' argument on appeal is that he is entitled to rescission of the Rossi Hills transaction notwithstanding these Findings of Fact by the trial court.

had knowledge or actual notice of the encroachments as legal prescriptive easements or encumbrances. In all of its other Findings of Fact and Conclusions of Law, the trial court scrupulously avoided the use of the word "easement" or the term "prescriptive easement," but rather utilized the word "encroachment." In fact, on page 2 of the trial court's Memorandum Decision of August 7, 1991 (R. 5325-28), the trial court specifically ordered that the words "prescriptive easement" be deleted from Conclusion of Law No. 2 and the word "encroachment" be inserted in its place.

Moreover, an interpretation of Finding of Fact 43 to mean that Doms had actual notice of prescriptive easements on the property in the fall of 1981 would contradict the trial court's own Conclusion of Law 34 (see Point I. C, infra). In addition, there is not one scintilla of evidence which would support a finding that Doms had actual notice of any legally recognized prescriptive easements on the property before he purchased it. All of the uncontradicted evidence, including the trial court's own Findings of Fact 35 and 42, clearly establish that Doms did not have any such knowledge or notice.

Plaintiffs fail to set forth and discuss several other pertinent Findings of Fact made by the trial court. Findings of Fact 14 and 15 establish that Plaintiffs knew about all of the encroachments, yet made no effort to remove or extinguish them. Findings of Fact 44 and 45 establish that Doms gave notice of his intent to rescind in January of 1985, and that Plaintiffs ignored Doms' settlement offer and filed their foreclosure action in June of 1985.

Plaintiffs attack Finding of Fact 44, in which the trial court found that Doms gave notice of his intent to rescind in January of 1985, without marshaling any evidence in support of this Finding. In so doing, Plaintiffs are guilty of the very failure that they have falsely asserted against Doms. All of the uncontradicted evidence in the record, including the very detailed testimony of attorney Jerry Kinghorn in regard to this issue, supports this Finding.

Plaintiffs also erroneously argue that Doms' tender of rescission in January of 1985 was not a valid offer to rescind because Doms allegedly did not own the property. At that time, Rossi Hills had been conveyed by warranty deed to Domcoy to facilitate the three-parcel development. Doms was the chief financial officer and secretary of Domcoy, and had the clear corporate authority to make a rescission offer and tender the property back to Plaintiffs pursuant to the By-Laws of Domcoy and the First Meeting of the Board of Directors of Domcoy (Exs. 32P, 38P; R. 7185, 7202). Furthermore, the uncontradicted testimony of Kinghorn, legal counsel for Domcoy, establishes that "Doms was Domcoy at that time" and "continues to be to this day" (R. 7517-20). Domcoy had become the "alter ego" of Doms, and Domcoy was merely the "bare legal title holder" of Rossi Hills for Doms, who was the equitable owner.[4]

The trial court's Findings of Fact and the uncontradicted evidence establish that Plaintiffs' misrepresentations and non-disclosures of material facts, upon which Doms reasonably relied, induced Doms to purchase Rossi Hills and continue his efforts to develop the property as part of the three-parcel development.[5] Any alleged delay by Doms in seeking rescission was the direct result of the intentional or negligent misrepresentations by Plaintiffs.

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[4] See Belnap v. Blain, 575 P.2d 696, 699 (Utah 1978); Barlow Society v. Commercial Security Bank, 723 P.2d 398, 401 (Utah 1986).

[5] Contrary to Plaintiffs' erroneous assertion, Doms never "abandoned" his causes of action for fraud and misrepresentation. The trial court simply indicated in open court that it was going to rule against Doms on these causes of action, and Doms therefore rested his case in regard to these issues. Doms' argument on appeal is that he is entitled to rescission or damages as a remedy for Plaintiffs' negligent or intentional misrepresentations. The standard of proof for Doms' cause of action for misrepresentation is a preponderance of evidence, rather than the clear and convincing evidence required to prove common law fraud. Baldwin v. Vantage Corp., 676 P.2d 413, 417 (Utah 1984). The trial court's Conclusion of Law 41 and paragraph 15 of the Judgment, insofar as they reject Doms' misrepresentation claim, are contradicted by the Findings of Fact and the evidence in the record. These rulings are in error and should be reversed.

In subpoints C and D of Point I of his opening brief, Doms sets forth with particularly the uncontradicted facts, totally consistent with the trial court's Findings of Fact, which preclude application of the equitable doctrine of laches against Doms. Doms acted promptly to rescind after obtaining knowledge, through diligent efforts, that there were legal encumbrances on Rossi Hills; and up to that time Doms diligently attempted to continue to develop the property and thereby mitigate damages. Doms cites relevant language from the factually analogous case decided by this Court in Breuer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah App. 1990), which is controlling and should determine the outcome of the instant case.

In their response brief, Plaintiffs misinterpret Breuer-Harrison and fail to address the controlling language and reasoning as set forth in Doms' opening brief. In Breuer-Harrison, like the instant case, the buyers walked the subject property with the sellers' real estate agent prior to their purchase. 799 P.2d at 719. The sellers' agent, like Plaintiffs' agent, Sloan, in regard to the encroachments on Rossi Hills in the instant case, was aware of what he termed a "water line" prior to the sale of the property, "but considered it only a minor impediment to the development of the property for housing units." Id. at 724. The buyers did not learn that this water line was an easement and constituted a legal encumbrance on the subject property until some four years after their purchase. Id. Although the buyers talked with the sellers approximately one year later about rescinding the contract as an option, the buyers did not seek rescission until some four years after they learned of the pipeline easement. Id. at 722, 726.

In the instant case, Doms immediately sought rescission after obtaining knowledge, through his diligent efforts and those of Kinghorn, that there were legal encumbrances on Rossi Hills. In Breuer-Harrison, this Court affirmed the summary judgment of the trial court granting rescission to the buyers and rejecting the sellers' laches claim, because the buyers were diligent in ascertaining the complete impact of the pipeline easement and continued to attempt to develop

the property around the easement and thereby mitigate damages. Id. at 726-27. The holding and reasoning of this Court in Breuer-Harrison are *a fortiori* applicable to the instant case and preclude application of laches against Doms.[6]

On pages 13-16 of their response brief, Plaintiffs mistakenly rely on Erisman v. Overman, 358 P.2d 85, 87 (Utah 1961); Perry v. Woodall, 438 P.2d 813, 815 (Utah 1968); Taylor v. Moore, 51 P.2d 222, 227 (Utah 1935); and Thompson on Real Property § 4465. These three cases and the single secondary authority simply stand for the proposition that in order to rescind a contract because of alleged fraud or misrepresentation, a buyer must act within a reasonable time after he has become aware of the fraud or misrepresentation and discovers the falsity of the statements on which he relied.

In the instant case, once Doms learned the truth about the encroachments on Rossi Hills, through his own diligent efforts, and discovered the falsity of Plaintiffs' representations regarding Rossi Hills and the encroachments, Doms immediately sought rescission of the Rossi Hills transaction. The cases and authority cited by Plaintiffs simply reinforce Doms' right to rescission and preclude application of the doctrine of laches.

As part of their erroneous argument that Doms did not act promptly to rescind, Plaintiffs allege on page 15 that "Doms continued to make payments under the contract for approximately six years." This assertion by Plaintiffs is patently false. Doms made payments on Rossi Hills under the contract from April of 1982 to December of 1984, a period of approximately two years and seven months (see Ex. 6P; Add. 7 to Doms' op. br.). Furthermore, once Doms learned that

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[6] The Utah Supreme Court has recently held that when one panel of the Court of Appeals is faced with a prior decision of a different panel, the doctrine of *stare decisis* has equal application, although the doctrine is typically thought of as applying to a single-panel appellate court. State v. Thurman, 846 P.2d 1256, 1269 (Utah 1993). Thus, Doms' right to rescission and rejection of Plaintiffs' laches claim in the instant case should be considered a matter of *stare decisis*.

he had been deceived by Plaintiffs, he demanded rescission and refused to make the principal payment of $194,250.00 purportedly due under the terms of the trust deed note.

In addition to failing to establish the first element of laches, an unreasonable delay or lack of diligence, Plaintiffs failed in the trial court and have failed on appeal to establish the second element of laches, an identifiable injury or prejudice owing to an unreasonable delay or lack of diligence. As set forth in Point I. E. of Doms' opening brief, Plaintiffs presented no evidence at trial to show that they had been injured or prejudiced by any alleged unreasonable delay, and based upon this complete lack of evidence, the trial court did not enter any Findings of Fact or Conclusions of Law that Plaintiffs had suffered injury or prejudice.

On pages 16-17 of their response brief, Plaintiffs now desperately attempt to establish the second element of laches by arguing that evidence was presented that the value of Rossi Hills had "depreciated to about 37% of the original value by the time of the action." The same argument of a plummeting real estate market and substantially decreased real estate values was made by the sellers in Breuer-Harrison, supra, and was categorically rejected by this Court. 799 P.2d at 726-27.

In addition, Plaintiffs' assertion is inaccurate and not supported by their citation to the record (R. 7825, 7937). These record citations are to a couple of statements made by Jerry Webber, the expert real estate appraiser retained and called by Doms as a witness. These statements were made in the second part of the bifurcated trial on August 21, 1990, four months after the trial court had already issued its Memorandum Decision applying laches and denying rescission on April 30, 1990 (R. 4188-95; Add. 21 to Doms' op. br.). Whether or not Plaintiffs were injured or prejudiced was not at issue and was never argued in the second part of the bifurcated trial regarding damages.

Furthermore, Plaintiffs' assertion regarding the decrease in value of Rossi Hills is not supported by Webber's cited testimony. Webber simply testified that "between 1983 and 1988 there was a significant decrease in value" of property in the Park City area, and that land values had declined at a rate of near 15% per year over the last eight years (R. 7825, 7937). Plaintiffs' assertion that Rossi Hills had depreciated to about 37% of its original value is fallacious and totally unsubstantiated.

In Point I. F of his opening brief, Doms establishes that Plaintiffs have acted in bad faith and come into Court with "unclean hands." In response, Plaintiffs assert that Doms knew the truth of all of Plaintiffs' misrepresentations either before or shortly after he purchased Rossi Hills. Plaintiffs' argument is clearly erroneous and has been fully addressed above.

C. <u>The trial court's Conclusions of Law denying rescission are legally incorrect and not supported by the pertinent Findings of Fact and the uncontradicted evidence.</u>

The trial court entered the following Conclusions of Law denying rescission of the Rossi Hills transaction:

> *33. In regard to the issue of whether or not Defendant Doms was entitled to rescind the contract, the Court concludes that Defendant Doms was bound to take remedial action after the Fall of 1981 which the Court determined to be the date he was made aware of the encroachments and loop road, and which was prior to the purchase of the Slipper parcel.*
>
> *34. It was not necessary for Defendant Doms to obtain a legal opinion that the loop road was a prescriptive easement or that the shed and fences had a legal basis for being on the Rossie [sic] Hills Property before he could make his tender to rescind.*
>
> *35. Once Defendant Doms knew of the road and encumbrances, he should have taken action within a reasonable time to notify the sellers of his intent to rescind the transaction.*
>
> . . .
>
> *39. Defendant Doms did not act within a reasonable time after he obtained knowledge that the loop road and the encroachments were upon the Rossie [sic] Hills Property.*

40. The Court concludes that Defendant Doms waited an unreasonable amount of time to seek rescission; therefore, rescission is not the appropriate remedy in this case and is barred by the doctrine of laches.

The trial court's Conclusions of Law are to be reviewed by this Court for legal correctness, with no deference to the trial court's rulings.[7] The initial and critical errors of law made by the trial court, upon which the remaining Conclusions of Law denying rescission are based, are contained in Conclusions of Law 33 and 34. In Conclusion of Law 33, the trial court ruled that Doms was bound to seek rescission after the fall of 1981, which was some four months before Doms purchased Rossi Hills. This ruling by the trial court demonstrates the court's confusion of the facts and misunderstanding of Utah law regarding rescission and laches. Conclusion of Law 33 further emphasizes that Doms was bound to seek rescission prior to his purchase of an interest in the Slipper parcel. This ruling by the trial court is directly contradicted by the trial court's own Findings of Fact 36 through 38, in which the trial court found that Doms purchased an interest in the Slipper parcel to further development of the three parcels as an integrated development. Thus, the trial court's conclusion that Doms should have sought rescission of the Rossi Hills transaction before he purchased an interest in the Slipper parcel makes no sense and is clearly in error.

Conclusion of Law 34 is a clear error of law which is the foundation for the trial court's denial of rescission and application of laches against Doms. In essence, the trial court ruled that Doms was bound to make his tender of rescission before he had any legal grounds to seek rescission. As already established in Point I. B above, the trial court's own pertinent Findings of Fact and the uncontradicted evidence show that Plaintiffs deceived Doms regarding the encroachments on Rossi Hills, and that Doms did not have knowledge that the loop road and

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[7] See, e.g., Bailey v. Call, 767 P.2d 138 (Utah App. 1989), *cert. denied*, 773 P.2d 45 (Utah 1989).

other encroachments constituted prescriptive easements or other legal encumbrances which would give him grounds to seek rescission until after the land survey of Rossi Hills was completed and Kinghorn had finished his investigation. Doms simply had no basis to seek rescission prior to Kinghorn's legal opinion, which was rendered as a result of the diligent efforts of Kinghorn and Doms.

Conclusions of Law 35, 39 and 40 reiterate and compound the legal errors made by the trial court in Conclusions of Law 33 and 34. The critical question should have been whether Doms sought rescission within a reasonable time after his diligent efforts established that there were legal encumbrances on the property which would give him grounds to seek rescission. Furthermore, the trial court ignored this Court's decision in Breuer-Harrison, supra, that laches cannot be applied against a buyer who diligently attempts to develop the property around easements and thereby mitigate damages.

In Conclusions of Law 36 through 38, the trial court made legal rulings regarding application of a decision by the Oregon Court of Appeals, Egeter v. West and North Properties, 758 P.2d 361 (Ore. App. 1988). The decision in Egeter became an issue in the instant case because Plaintiffs had misrepresented the holding of Egeter in their trial brief (R. 4058). Doms pointed out on pages 22-24 of his "Trial Brief Regarding Issue of Laches" (R. 5122-24; Add. 22 to Doms' op. br.), that the Egeter Court had actually affirmed the decision of the lower court rescinding a contract in a situation analogous to the facts of the instant case. The trial court in the instant case therefore attempted to distinguish Egeter in Conclusions of Law 36 through 38. However, the trial court's interpretation of Egeter is factually inaccurate and legally incorrect. Egeter clearly supports Doms' argument on appeal that the trial court should have rescinded the Rossi Hills transaction.

D. The Rossi Hills transaction was an executory, not an executed, contract because of Plaintiffs' breach of the covenants and warranties in the warranty deed.

Plaintiffs make the erroneous argument in Point I. C of their response brief that the Rossi Hills transaction was an executed contract and that cases such as Breuer-Harrison, supra, and Bergstrom v. Moore, 677 P.2d 1123 (Utah 1984), are inapplicable because they involve executory real estate land contracts. Inexplicably, Plaintiffs cite language from the very Utah case which defeats their argument, Adams v. Reed, 40 P. 720 (Utah 1895), *affirmed*, Adams v. Henderson, 168 U.S. 584 (1897). This is the seminal Utah case which establishes the precedent for Doms' right to rescission in the instant case.

In Adams v. Reed, the Utah Supreme Court held that where there are title defects or an easement exists on the property to be conveyed, a warranty deed does not convey a fee simple as required by the covenants and warranties contained in the deed. 40 P. at 723-25. Thus, the Court held that where the sellers, who made only innocent or negligent misrepresentations, represented in the covenants and warranties of the warranty deed that they held fee simple title to the land, equity will treat the transaction as an executory contract to convey, and rescind the warranty deed, note and mortgage. Id. In so holding, the Court reasoned as follows:

> [W]e are of the opinion that the facts in this case do not constitute an executed contract. The transaction between the parties, we think, evidences an executory contract, and that equity has power to decree a rescission. We are not determining what *mala praxis* is sufficient to entitle one to rescind an executed contract; for, as stated, the transaction in this case shows an executory contract, and we believe the rule to be well settled that material representations which are untrue, though innocently made, or the concealment of materials facts by mistake or inadvertence, when relied on and which have become the foundation of the active relations

between the parties, operate as a "surprise and imposition," and constitute such fraud as will move a court of equity to decree a rescission of an executory contract.

40 P. at 724-25 (emphasis added).[8]

Furthermore, Plaintiffs completely ignore Adams v. Henderson, supra, in which the United States Supreme Court affirmed the decision of the Utah Supreme Court. The Henderson Court stated that because the railroad company had an easement on the property in question, "A court of equity could not compel the defendants to take and pay for land thus encumbered without making for the parties a contract which they did not choose to make for themselves." 168 U.S. at 587-88. Therefore, the Court held that the buyers were not bound to accept the warranty deed, the sellers could not convey the title they agreed to convey, the cash payments by the buyers were made upon the basis of a good and indefeasible title, and the buyers were entitled "to have a decree which, in effect, rescinds the contract, and gives them back what they paid." Id. at 588.

The facts of the instant case are directly analogous to the facts in Adams. Like the sellers in Adams, Plaintiffs in the instant case breached the covenants and warranties in the warranty deed conveying Rossi Hills because there were defects in title to the property and the property was encumbered by easements. Thus, the Rossi Hills transaction constitutes an executory contract, not an executed contract, and is fully rescindable under Utah law. Moreover, the holdings in Breuer-Harrison and Bergstrom are *a fortiori* applicable to Doms' right to rescission in the instant case because an actual breach occurred in the instant case, rather than an anticipatory breach.

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[8] Adams v. Reed follows the general rule of law throughout the country that a contract remains executory until it has been fully performed according to its terms. See, e.g., 15A Words and Phrases, Executed Contract, pp. 250-53 (perm. ed.); 17A Am. Jur.2d Contracts § 6; 17 C.J.S. Contracts § 7.

It should also be pointed out that Plaintiffs have not cited a single Utah case which holds than an executed contract cannot be rescinded.[9] The Idaho Supreme Court and, more recently, the Idaho Court of Appeals, have held that fully executed contracts may be rescinded. Lowe v. Lym, 646 P.2d 1030, 1032 (Idaho App. 1982), citing Mohr v. Shultz, 388 P.2d 1002, 1008 (Idaho 1964). Lowe v. Lym is cited with approval by the Utah Supreme Court in Spore v. Crested Butte Silver Mining, Inc., 740 P.2d 1304, 1308 (Utah 1987). Respected authorities are also in agreement that executed contracts involving deeds, mortgages and deeds of trust can be rescinded on grounds other than fraud.[10]

In regard to defects in Plaintiffs' title to Rossi Hills, Plaintiffs are mistaken in their assertion that the issue of boundary by acquiescence was not raised and argued before the trial court. In fact, in one of their several memoranda objecting to the trial court's Findings of Fact and Conclusions of Law, Plaintiffs argued that the lot encroachments on Rossi Hills were not legal and did not constitute a boundary line by acquiescence, and acknowledged that Doms had previously argued that these encroachments did constitute a boundary by acquiescence (R. 4581, 4585). Furthermore, Conclusions of Law 2, 3, 4 and 10 are not limited to only the covenant against encumbrances, and are clearly supported by Findings of Fact 11, 12 and 13, and the uncontradicted testimony of Ella and Elden Sorensen (see Point I. A of Doms' op. br.).

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[9] Exhaustive research by counsel for Doms has failed to locate a single Utah case holding that an executed contract cannot be rescinded. In fact, the Utah Supreme Court has rescinded transactions involving warranty deeds, notes and mortgages, without fraud as the basis for rescission. See, e.g., Naylor v. Jensen, 113 P. 73 (Utah 1911); Rosenthyne v. Matthews-McCulloch Co., 168 P. 957 (Utah 1917).

[10] See, e.g., 7 S. WILLISTON, THE LAW OF CONTRACTS § 926 (3d ed. 1963); 12A C.J.S. Cancellation of Instruments § 18; 8A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 4465 (1963 repl.).

A property owner acquires title to property under the doctrine of boundary by acquiescence when the following four factors are established: (1) occupation up to a visible line marked by monuments, fences, or buildings; (2) mutual acquiescence in the line as a boundary; (3) for a long period of time (usually the common law prescriptive period of 20 years); and (4) by adjoining land owners. Staker v. Ainsworth, 785 P.2d 417, 420 (Utah 1990). Findings of Fact 11-13, the uncontradicted testimony of the Sorensens, and the Alliance Engineering Survey (Ex. 77D), establish that Plaintiffs breached the covenant of general warranty of title when they conveyed Rossi Hills to Doms in March of 1982.

E. The doctrine of merger has nothing to do with Doms' right to rescission of the Rossi Hills transaction.

Point I. C of Plaintiffs' response brief argues that "rescission is not available because the only contract is the deed." In support of this erroneous argument, Plaintiffs cite several Utah cases which expound upon the doctrine of merger.[11] This argument is another smoke screen which Plaintiffs also used to confuse the trial court regarding the issue of whether the warranty deed, trust deed and trust deed note constitute a single contract or transaction (this issue is fully briefed in Point II, infra). The doctrine of merger has absolutely nothing to do with Doms' right to rescission in the instant case. Doms is seeking rescission based upon Plaintiffs' breach of the covenants and warranties contained in the warranty deed itself, not in the earnest money agreement or any other antecedent agreement. Plaintiffs' numerous other misrepresentations of material facts regarding Rossi Hills were also not terms of any antecedent agreement and did not relate to the delivery of title by Plaintiffs. These misrepresentations were not extinguished and

[11] Plaintiffs cite Stubbs v. Hemmert, 567 P.2d 168, 169 (Utah 1977); Embassy Group, Inc. v. Hatch, 227 Utah Adv. Rpt. 60, 61 (Utah App. 1993); Espinoza v. Safeco Title Insurance Co., 598 P.2d 346 (Utah 1979).

merged into the warranty deed, but rather constitute an independent cause of action which also entitles Doms to rescission.

F. The trial court's Judgment denying rescission should be reversed.

In Papanikolas Bros. Enterprises v. Sugarhouse Shopping Center Associates, 535 P.2d 1256 (Utah 1975), the Utah Supreme Court stated the following:

> The existence of laches is one to be determined primarily by the trial court; and reviewing courts will not interfere with the exercise of the trial court's discretion in the matter, unless it appears that a manifest injustice has been done, or the decision cannot reasonably be found to be supported by the evidence. In addition, a reasonable delay caused by an effort to settle a dispute does not invoke the doctrine of laches.

535 P.2d at 1260 (footnotes omitted and emphasis added).

In the instant case, the trial court's application of laches against Doms clearly "cannot reasonably be found to be supported by the evidence." The trial court's own Findings of Fact and the uncontradicted evidence preclude application of laches. The trial court's Conclusions of Law denying rescission are legally incorrect and not supported by the trial court's own Findings of Fact and the uncontradicted evidence. In addition, any alleged delay by Doms in seeking rescission was from his good faith efforts to work around the encumbrances and settle the dispute.

Papanikolas also states that the propriety of a laches claim "is equally predicated upon the gravity of the prejudice suffered . . . and the length of . . . delay." 535 P.2d at 1260. In the instant case, no evidence of prejudice has ever been presented, and the trial court failed to enter any Findings of Fact or Conclusions of Law that Plaintiffs suffered any prejudice.

Finally, application of laches in favor of Plaintiffs and against Doms would indeed constitute a "manifest injustice." Plaintiffs deceived and duped Doms into purchasing Rossi Hills, frustrated every attempt by Doms to settle the dispute short of protracted litigation, and

have come into court seeking equitable relief when they have "unclean hands" and have acted in bad faith.

Doms is entitled to rescission of the Rossi Hills transaction, and the Judgment of the trial court denying rescission should be reversed.

POINT II

THE TRIAL COURT ERRED BY RULING THE WARRANTY DEED, TRUST DEED AND TRUST DEED NOTE DO NOT CONSTITUTE A SINGLE CONTRACT OR TRANSACTION, AND BY REFUSING TO RULE THAT DOMS WAS EXCUSED FROM PERFORMANCE AND NOT IN DEFAULT UNDER THE TRUST DEED AND TRUST DEED NOTE.[12]

A. The warranty deed, trust deed and trust deed note constitute a single contract or transaction and must be construed together in determining the rights and obligations of the parties.

The trial court entered the following Conclusions of Law in regard to whether or not the warranty deed, trust deed and trust deed note constitute a single contract:

> *6. The Warranty Deed, Trust Deed Note and Trust Deed prepared at the same time do not constitute a single contract.*
>
> *7. The Court believes that the law applicable to this case is: The acceptance of the Deed completes the execution of the contract, and the Deed become [sic] final and conclusive evidence of the contract under which it is executed (84 A.L.R. 1009).*
>
> *8. The Court concludes that the Utah case of Reese Howell Company v. Brown, 48 Utah 142, 158 P. 684, 689 (1916), sets forth the controlling law which must be applied in the instant case regarding the issue as to whether or not the Warranty Deed, Note and Trust Deed constitute a single contract.*
>
> *9. The fact that a Trust Deed and Note were executed at the same time does not make them part of the contract to purchase the property. The Trust Deed and Note are documents executed to secure the payment of the property, and have no bearing upon whether the property is free and clear of encumbrances.*

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[12] Almost all of the cases and authorities cited in Point II of both Doms' opening brief and this reply brief were submitted to the trial court, and are part of the record (see R. 4681-4870).

Conclusions of Law 6, 7, 8 and 9 constitute clear errors of law by the trial court and must be reversed under the correction of legal error standard of review. Plaintiffs' argument in Point II of their response brief that the warranty deed constitutes a separate contract from the trust deed and trust deed note is a completely unsubstantiated and erroneous argument. Plaintiffs have never, either to the trial court or to this Court on appeal, presented a single case or authority in support of their argument. Plaintiffs manufactured this argument out of thin air, and it constitutes nothing more than another smoke screen and subterfuge.

Inexplicably, Plaintiffs cite language from Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266, 271 (Utah 1972), which defeats the very argument advanced by Plaintiffs. The same language from Bullfrog Marina cited by Plaintiffs is cited by Doms on pages 30-31 of his opening brief. Plaintiffs' argument that the "same parties" were not involved in the warranty deed, trust deed and trust deed note is clearly without merit. The same parties were involved in all three of these documents: D.C. Anderson, Dan Scott, Doms and McCoy. The fact that the wives of Anderson and Scott also executed the warranty deed is irrelevant and has no bearing on construing the three documents as a single contract. Anderson and Scott could have included their wives as beneficiaries under the trust deed and trust deed note, or made them the sole beneficiaries, and this would still not change the nature of the Rossi Hills transaction as a single contract involving the three contract documents: the warranty deed, the trust deed and the trust deed note. Plaintiffs' argument that these three documents "do not concern the same subject matter" is ludicrous. All three documents are concerned with the Rossi Hills transaction, and all three documents must exist for the transaction to be completed.

Plaintiffs are also clearly mistaken in their argument that the Utah case law set forth on pages 29-30 of Doms' opening brief does not establish that the three documents constitute a single contract. Plaintiffs fail to recognize that a trust deed or mortgage cannot exist without a

warranty deed or other deed of conveyance which first conveys the subject property to the buyer (the trustor or mortgagor). The trust deed or mortgage then creates a lien against the property. In the instant case, the trustor (Doms) conveyed the legal title to the trustee by executing the trust deed, and the trustee held the property in trust for the beneficiaries (Plaintiffs) to secure payment of the trust deed note. Doms would have had no legal title and nothing to convey to the trustee unless he had first received the warranty deed to Rossi Hills.

Also, in the instant case, Plaintiffs filed an action to foreclose their trust deed as a mortgage, which would operate to foreclose any right, title or interest of Doms to Rossi Hills. A foreclosure would operate upon all three documents which constitute the contract between the parties: the note, the trust deed and the warranty deed. Plaintiffs could never foreclose without cancelling the warranty deed. Thus, Plaintiffs' argument would defeat their own action to foreclose in the instant case.

Bybee v. Stuart, 189 P.2d 118 (Utah 1948), holds that a warranty deed and a contract to pay for the property constitute a formal mortgage:[13]

> Our statute . . . furnishes a form for real estate mortgages. However, it is not necessary that an instrument follow the statutory form to be a mortgage. No particular form is necessary so long as the intention of the parties is shown. Nor is it necessary that the mortgage be contained in one writing -- it may consist of a warranty deed and a separate contract in writing. (citations omitted).
> . . .
> The two instruments, taken together, constitute a formal mortgage, cognizable in a court of law.

189 P.2d at 122 (emphasis added).

Thus, it is clear under Utah law that a warranty deed is deemed to be part and parcel of a mortgage or trust deed. Together with the note, these documents constitute a single contract.

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[13] See also Brown v. Skeen, 58 P.2d 24, 32 (Utah 1936); Kjar v. Brimley, 497 P.2d 23, 25-26 (Utah 1972). Bybee, Brown and Kjar are cited on pp. 29-30 of Doms' opening brief.

This fact is made clear in First Savings Bank of Ogden v. Brown, 54 P.2d 237, 240-41 (Utah 1936), which holds as follows: "The note and mortgage given at the same time, and as parts of the same transaction, must be construed together as constituting one contract. They supplement each other and express the entire contract between the parties." (emphasis added).

The general rule of law throughout the country is also clearly in agreement with Utah law. For example, 59 C.J.S. Mortgages § 156, sets forth the rule as follows: "Where a deed, lease, or other written instrument is incorporated in a mortgage by reference, or is given as part of the same transaction, the two instruments should be read and construed together, . . . "

Another example is set forth in 17A Am. Jur. 2d Contracts § 388, which sets forth the general rule as follows:

> The general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together, since they are, in the eyes of the law, one contract or instrument. The rule applies even where the parties are not the same, if the several instruments were known to all the parties and were delivered at the same time to accomplish an agreed purpose.

In essence, the Rossi Hills transaction is a classic bilateral contract. Plaintiffs executed the warranty deed in consideration for the execution of the trust deed and trust deed note by Doms and McCoy. Likewise, Doms and McCoy executed the trust deed and trust deed note in consideration for the execution of the warranty deed by Plaintiffs.

B. Construction of the warranty deed, trust deed and trust deed note as a single contract is not affected by the doctrine of merger.

In Conclusions of Law 7 and 8, the trial court specifically relied on an old A.L.R. article (84 A.L.R. 1009) and the old Utah case of Reese Howell Co. v. Brown, 158 P.2d 684, 689 (Utah 1916), as the "controlling law" which allegedly demonstrate that the warranty deed, trust deed and trust deed note do not constitute a single contract. Reese Howell Co. and the cited A.L.R.

articles discuss the doctrine of merger and have absolutely nothing whatsoever to do with whether or not the warranty deed, trust deed and trust deed note constitute a single contract. As set forth in Reese Howell Co., and in more recent Utah case law,[14] the doctrine of merger provides that the provisions of an antecedent agreement for the conveyance of real estate are generally merged into the deed of conveyance, and when the terms of the deed cover the same subject matter as the antecedent agreement, the deed controls.

In the instant case, the trust deed and the trust deed note are not antecedent agreements which merge into the warranty deed, but rather are contemporaneous agreements which are construed together with the warranty deed as a single contract. This fact is clearly pointed out in the very A.L.R. article cited by the trial court in Conclusion of Law 7:

> A deed is a mere transfer of the title, a delivery so to speak of the subject-matter of the contract. It is the act of but one of the parties, made pursuant to a previous contract either in parol or in writing. It is not to be supposed that the whole contract between the parties is incorporated in the deed made by the grantor in pursuance of, or as the consummation of, a contract for the sale of land. There are many things pertaining to the contract which it is manifest are never inserted in a deed.

Annotation, Merger of Contract in Deed, 84 A.L.R. 1008, 1009 (emphasis added).

C. Doms was excused from performance and was never in default under the trust deed and trust deed note.

In Point II. C of his opening brief, Doms cites extensive Utah Case law and other authority which clearly set forth the law that Doms was excused from performance of the Rossi Hills contract because of Plaintiffs' breach of the covenants and warranties in the warranty deed, and Doms was therefore never in default under the trust deed and trust deed note.

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[14] See, e.g., Embassy Group, Inc. v. Hatch, 227 Utah Adv. Rpt. 60 (Utah App. 1993), and cases cited therein.

In their response brief, Plaintiffs do not cite a single Utah case or other authority to refute that Doms was excused from performance and was not in default. Rather, Plaintiffs simply restate and rely entirely on their previous erroneous arguments that the Rossi Hills transaction constitutes two separate executed contracts. Plaintiffs' argument regarding separate contracts is disposed of in subpoints A and B immediately above, and their argument regarding executed versus executory contracts is disposed of in subpoint I. D, supra. Doms submits that the reason Plaintiffs have failed to cite any authority in support of their arguments is that it simply does not exist.

D. If rescission is denied, the Judgment of the trial court should be reversed and Judgment should be entered as set forth in Point II. E of Doms' opening brief.

Point II. E of Doms' opening brief sets forth with particularity the Judgment that should be entered against Plaintiffs if this Court denies rescission of the Rossi Hills transaction. The only question involves the amount of damages which Doms should receive for Plaintiffs' breach of the covenants and warranties in the warranty deed, and this question is answered in Point III, infra.

In Point II. C of their response brief, Plaintiffs argue that Doms is not entitled to any set-offs against the purchase price of Rossi Hills. Plaintiffs' argument is based entirely on the erroneous argument that the Rossi Hills transaction should be split into two separate contracts. Since this argument is totally without merit, Plaintiffs' argument against set-offs is equally without merit. Furthermore, any disputes that Plaintiffs may have amongst themselves in regard to who is responsible for payment of the Judgment are Plaintiffs' problems and must be resolved by actions for contribution or the like.[15] In addition, Plaintiffs' argument fails to recognize that

[15] See, e.g., Federal Deposit Insurance Corp. v. Bismark Investment Corp., 547 P.2d 212, 214 (Utah 1976); Rule 69(h), U.R.C.P.; U.C.A. §§ 15-4-1 through 7.

each of the four Plaintiffs is jointly and severely liable for the full amount of the Judgment because they all executed the warranty deed and thus became liable for the breaches of the statutory covenants and warrants contained in the warranty deed.

POINT III

IF RESCISSION IS DENIED, THE TRIAL COURT ERRED BY AWARDING DOMS ONLY ONE-HALF THE AMOUNT OF DAMAGES FOUND BY THE EXPERT APPRAISER, JERRY WEBBER, AS A RESULT OF THE ENCUMBRANCES ON ROSSI HILLS.

A. Doms is entitled to $166,050.00 in damages for the encumbrances on Rossi Hills, as determined by the expert appraiser, Jerry Webber.

Point III of Doms' opening brief sets forth with particularity the trial court's correct Conclusions of Law, and the applicable Utah law, for the proper measure of damages with all the encumbrances in place and as they existed in March of 1982. Based upon application of the correct law, Doms has established that he should have been awarded $166,050.00 in damages found by the expert appraiser, Jerry Webber, because it represents the only determination based upon assumptions and conditions permitted by law. On the other hand, the testimony and appraisal report of Plaintiffs' appraiser should have been disregarded because the determinations were based upon assumptions and conditions not permitted by law.

In Point III. A of their response brief, Plaintiffs claim that Doms has no right to damages because he "sold the property and received full consideration." This statement is false. Plaintiffs are referring to the transfer of Rossi Hills by Doms and McCoy to Domcoy, the development corporation. The property was not "sold" to Domcoy by Doms and McCoy. The uncontradicted evidence in the record establishes that Domcoy paid no consideration whatsoever to Doms or McCoy for the transfer (R. 7318). Rather, Doms and McCoy simply conveyed the property to their closely held corporation to facilitate the three-parcel development. Therefore, Plaintiffs' argument that Doms is not entitled to any damages "because this would be double recovery" is

clearly without merit. Likewise, Plaintiffs' assertion that Doms "abandoned all claims for damage" is absolutely false and utterly devoid of any support in the record.

In Point III. B of their response brief, Plaintiffs continue to make the untenable argument they make in Point VII of their opening brief: that is, the statutory covenant against encumbrances contained in the warranty deed should not cover apparent, irremediable encumbrances. The Utah Supreme Court has consistently ruled that the covenant against encumbrances protects against all known as well as unknown encumbrances.[16] Plaintiffs' argument is inappropriate and must be rejected, as they are asking this Court to disregard the law as set forth by the Utah Supreme Court.

On page 25 of their response brief, Plaintiffs make the baseless assertion that the trial court's determination of Doms' damages was speculative because "[n]o evidence was adduced to indicate what the value of the property would have been on the date of the sale to Doms and McCoy if the encumbrances were not in place." This statement is absolutely false. Webber specifically calculated the fair market value of Rossi Hills in March of 1982 without any encumbrances to be $276,750.00. (R. 7860-64; Ex. 88D).

Plaintiffs' argument that Doms should be entitled to only one-half of any damages awarded by the trial court is also clearly without merit. Doms is the fee simple owner of Rossi Hills pursuant to the warranty deed from Domcoy to Doms dated August 26, 1988 (Ex. 17P; Add. 16 to Doms' op. br.). McCoy has no interest whatsoever in Rossi Hills, and in fact was not a party to the lawsuit after the default judgment was entered against him on January 20, 1988; and McCoy is not a party to this appeal. Plaintiffs' argument, in essence, amounts to a claim that they are entitled to a set-off against the default judgment entered against McCoy. This would

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[16] See, e.g., Jones v. Grow Investment & Mortgage Co., 358 P.2d 909, 911 (Utah 1961); Bergstrom v. Moore, 677 P.2d 1123, 1125 (Utah 1984).

be clearly inequitable and result in the unjust enrichment of Plaintiffs. Plaintiffs are asking this Court to allow them a windfall as a result of their own breach of the covenants of warranty when they sold the property. Equity simply cannot allow this to happen.

In addition, Plaintiffs have sued Doms personally for the full amount purportedly due under the trust deed and trust deed note, claiming joint and several liability on the part of Doms and McCoy. Likewise, Plaintiffs are jointly and severely liable to Doms personally for the full amount of damages, or for the return of all money received by Plaintiffs if rescission is granted, because of Plaintiffs' breach of the covenants and warranties in the warranty deed.

On page 26 of their response brief, Plaintiffs argue that Doms did not present any evidence of the value of Rossi Hills as part of the three-parcel development, and therefore Doms' damage evidence should be disregarded. This argument is clearly without merit. The three-parcel development was a speculative and potential development only, and never happened. It would have been clear error for the trial court to attempt to determine damages based upon a non-existent integrated development of Rossi Hills with other parcels of property.

On page 27 of their response brief, Plaintiffs mistakenly rely on two Utah Supreme Court cases and a decision by this Court for the erroneous argument that the methodology used by Webber has been expressly disapproved by the holdings in these cases.[17] The Tedesco, Hansen and Thorsen cases simply set forth the law that the market value of property must be determined by what a purchaser would be willing to pay for it in the condition that the property is in, having in view the purposes for which it is best adapted. This is exactly what Webber did in the instant case in determining the market value of Rossi Hills in March of 1982, both with and without the

[17] See State v. Tedesco, 291 P.2d 1028, 1030 (Utah 1956); Utah Road Commission v. Hansen, 383 P.2d 917, 920 (Utah 1963); Thorsen v. Johnson, 796 P.2d 409, 410 (Utah App. 1990).

encumbrances. The "fair market value" definition used by Webber in his appraisal is the definition used by the Federal Home Loan Bank Board and used by most appraisal organizations (R. 7823; Ex. 88D, pp. 4-5). Webber utilized the direct sales comparison approach to estimate the value of Rossi Hills as vacant land, which involved direct comparisons of Rossi Hills to similar properties that sold in the Park City area in 1981 and 1982 (Ex. 88D, pp. 44-55). This is a standard methodology utilized by virtually all appraisers, and in fact is exactly the same methodology utilized by Pia, Plaintiffs' appraiser.[18]

It should also be pointed out that the very cases relied upon by Plaintiffs on page 27 of their response brief conclusively establish that it would have been error for the trial court to measure damages based upon the non-existent, speculative three-parcel development.[19]

On page 26 of their response brief, note 5, Plaintiffs make the patently false assertion that "it was established that the encumbrances could be relocated on appropriate request." Plaintiffs' citation to the record (R. 2616, 17) is an obviously inaccurate citation, as these pages of the record have nothing to do with the issue of whether the encumbrances could be relocated. On the contrary, Elden and Ella Sorensen testified that they would not sell their right to access to their property via the loop road (R. 7365), and Pia testified that Ella Sorensen told him she would not voluntarily remove her shed and fences (R. 8244).

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[18] In his appraisal report, Pia utilized the same definition of "fair market value" set forth by the Federal Home Loan Bank Board that Webber utilized in his appraisal report (Ex. 91P, p. 3). Pia also utilized the same methodology of direct sales comparisons in the Park City area for the years 1981 and 1982, which included many comparisons which were also utilized by Webber (Ex. 91P, pp. 30-32). It is not the methodology utilized by Pia which renders his determinations of the value of Rossi Hills to be without merit, it is the fact that Pia's determinations are based on assumptions and conditions not permitted by law (see Doms' op. br., Point III. E, pp. 40-42).

[19] See note 17, supra.

B. The valuations of Rossi Hills by Plaintiffs' appraiser should have been disregarded by the trial court because they were based on assumptions and conditions not permitted by law.

Point III. E of Doms' opening brief (pp. 40-42) sets forth with particularity the erroneous assumptions and conditions relied upon by Pia which were not permitted under Utah law and/or Park City ordinances. In their response brief, Plaintiffs completely fail to address a single one of the 20 paragraphs set forth in Doms' opening brief, with the exception of the issue of whether one-half of McHenry Avenue could be used for development (which will be discussed, infra). Rather, Plaintiffs attempt to use another smoke screen by inaccurately setting forth assertions not supported by the record, irrelevant pieces of evidence which have nothing to do with a proper valuation of Rossi Hills, and erroneous legal arguments regarding vacation of McHenry Avenue and the appraisal methodology utilized by both Webber and Pia. Plaintiffs' so-called evidence in support of the trial court's rulings regarding damages is set forth in the numbered paragraphs 1 through 11, on pages 28-31 of their response brief.

In paragraph 1, Plaintiffs argue that Doms suffered no damages because Webber "admitted" that the selling price of Rossi Hills could be the fair market value if a person offered to pay that much for it after having viewed the encroachments. This assertion is incorrect and not supported by Plaintiffs' citation to the record (R. 7882). An examination of the record reveals that this line of questioning by Plaintiffs was objected to by Doms and that Webber made no such admission as asserted by Plaintiffs (R. 7882-90). Webber's actual testimony was that the selling price might reflect the fair market value if the buyer was aware of all of the easements and encumbrances, aware of all of the uses the property could be put to, and assumed that the seller would take care of any problems because he delivered a warranty deed guaranteeing that there were no defects in title or encumbrances on the property (R. 7888-89).

In paragraph 2, Plaintiffs argue that Pia testified the fair market value of Rossi Hills in March of 1982 with the encumbrances was somewhere between $240,000.00 to $250,000.00, and that Pia used eight comparable sales and an appropriate methodology in determining fair market value. The problems with Pia's valuation of Rossi Hills have nothing to do with his methodology or the comparable sales utilized. In fact, as already point out, supra, both Pia and Webber utilized the same appraisal methodology and many of the same comparable sales. The problems with Pia's valuation, which Plaintiffs totally ignore and fail to respond to, are that he relied upon a 14-unit plan which could not be built in March of 1982, and which disregarded all of the encroachments and encumbrances on the property, including the loop road; and also which assumed that one-half of McHenry Avenue could be utilized for the development.

In paragraph 3, Plaintiffs assert that Webber based his appraisal report on the use of McHenry Avenue as a means of access to Rossi Hills. Plaintiffs' citation to the record (R. 7900) was a response by Webber to a line of questions from Plaintiffs regarding potential access to the property and potential development of the property. Although Webber considered McHenry Avenue as a logical location for another access point to the property, the only access point actually utilized by Webber in arriving at his valuations of Rossi Hills was the existing access from the old railroad dugway (see F. of F. 7; Ex. 88D, p. 24). Any possible misunderstanding in regard to this issue was clarified by Webber's later testimony that his valuation of Rossi Hills, with all of the encumbrances in place in March of 1982 at $110,700.00, was not based in any way on the use of McHenry Avenue as access (R. 8197).

In paragraphs 4 and 9, Plaintiffs erroneously argue that one-half of McHenry Avenue could be utilized for development of Rossi Hills, citing North Temple Investment Corp. v. Salt Lake City Corp., 489 P.2d 106 (Utah 1971). Plaintiffs' reliance on this case is misplaced, as the trial court correctly found and concluded that McHenry Avenue had not been vacated by Park

City or by a quiet title or other judicial determination, and therefore McHenry Avenue could not have been utilized as part of the development for Rossi Hills (F. of F. 16, 31, 32; C. of L. 17, 18). North Temple Investment clearly stands for the proposition that it would take a quiet title action to acquire the right to use McHenry Avenue. Furthermore, in order to correctly rely on North Temple Investment, Plaintiffs would have to have introduced into evidence a certified copy of a plat of the Park City Survey showing this subdivision prior to 1890. 489 P.2d at 106-07. Plaintiffs' only evidence was a certified copy of a 1911 plat of the subdivision (Ex. 99P). Also, in North Temple Investment, none of the subdivision had ever been developed and none of the streets designated for public use had ever been developed or used by Salt Lake City or any other party. On the contrary, in the instant case, much of the subdivision in question had already been developed and many of the streets had been developed and dedicated by Park City and other parties.

In paragraph 5, Plaintiffs erroneously argue that the methodology used by Webber in his appraisal of Rossi Hills was expressly disapproved by the Utah Supreme Court in State v. Tedesco, 291 P.2d 1028 (Utah 1956). This argument is clearly without merit, and has already been discussed in detail, supra.

In paragraph 6, Plaintiffs' argue that Webber estimated the fair market value to be $166,000.00, based upon six residential units which could be developed on the property. Plaintiffs fail to point out that this valuation by Webber was based on an assumption that the loop road could be disregarded and a new access road constructed bordering the shed and fence encroachments on the western side of the property (R. 7864-66; Ex. 88D, p. 55). However, this scenario cannot be utilized to determine the damages because Utah law clearly requires that damages must be measured with all the encumbrances in place and as they existed in March of 1982 (see Point III. B of Doms' op. br.; C. of L. 14). The only relevant evidence introduced was

Webber's valuation of $110,700.00, which was based upon a maximum of four residential units because of the encroachments and encumbrances on the property.

In paragraph 7, Plaintiffs' argument that Doms withdrew his cause of action for loss of profits is completely irrelevant to the proper measure of damages, which is the value of the property without any encumbrances minus the value with the encumbrances in March 1982.

In paragraph 8, Plaintiffs make another totally irrelevant argument regarding zoning ordinances which had not been adopted by Park City in March of 1982. This argument is simply another smoke screen and subterfuge by Plaintiffs in regard to the damages issue.

In paragraph 9, Plaintiffs simply continue their erroneous argument regarding the availability of McHenry Avenue for development of the property.

In paragraph 10, Plaintiffs make another totally irrelevant argument regarding appraisal of the value of Rossi Hills in August of 1983. This is simply another attempt by Plaintiffs to divert attention from the only relevant date for determining the value of Rossi Hills, March of 1982.

In paragraph 11, Plaintiffs argue that it is unclear whether Webber's appraisal was based on a Park City ordinance in effect in 1982 which prohibited building on a slope greater than 30% in an HR-1 zone, which did not apply to Rossi Hills. Webber clarified this point by directly testifying that the fact that there was no such ordinance applicable to Rossi Hills did not affect his opinions or conclusions regarding the value of the property (R. 8201).

C. The trial court should have excluded Exhibits 91P and 98P, and disregarded the testimony of Pia and Deckert in regard to these exhibits.

Point III. D of Doms' opening brief sets forth with particularity the reasons why the trial court should have excluded Exhibits 91P and 98P, and disregarded the testimony of Pia and Deckert in regard to these exhibits, as a sanction against Plaintiffs for violating discovery rules.

Doms had a continuing and specific request for the production of all documents intended to be introduced at trial by Plaintiffs (see Add. 25 to Doms' op. br.). Exhibit 91P is Pia's final appraisal report, and Exhibit 98P is Deckert's 14-unit proposal for Rossi Hills.

It is clear from the facts and testimony set forth on pages 38-39 of Doms' opening brief that Plaintiffs deliberately failed to provide Exhibits 91P and 98P to Doms prior to trial. Plaintiffs disregarded the rules of discovery and attempted to conduct a trial by ambush. Plaintiffs clearly acted in bad faith and should have been sanctioned by the trial court.

Plaintiffs argue in Point III. D of their response brief that Doms has not demonstrated how his substantial rights were affected by the admission of this evidence. This argument is clearly without merit, as these two exhibits and the testimony of Pia and Deckert in regard to them constituted a substantial part of Plaintiffs' case regarding the issue of damages suffered by Doms as a result of the encumbrances on Rossi Hills.

Plaintiffs go on to make the unmeritorious argument that Doms could have scheduled Pia's deposition and declined to do so. This argument ignores Plaintiffs' deliberate violation of discovery rules and begs the question regarding sanctions by the trial court. Doms was under no obligation to take Pia's deposition, and had every reason and right to believe that he had already received Pia's appraisal report and any other documents intended to be introduced by Plaintiffs at trial. The trial court allowed Doms no additional time to prepare for Deckert's testimony in regard to Exhibit 98P, and allowed Doms only one night in between trial days to prepare for Pia's testimony in regard to Exhibit 91P.

Plaintiffs mistakenly rely on this Court's decision in Berrett v. Denver & Rio Grande W.R., 830 P.2d 291, 296 (Utah App. 1992), *cert. denied*, 836 P.2d 1383 (Utah 1992). In Berrett, the trial court excluded some of plaintiffs' witnesses from testifying because they were not on plaintiffs' final witness list. The majority opinion in Berrett held that "absent an order creating

a judicially imposed deadline, a trial court may not sanction a party by excluding its witnesses under rule 37(b)(2)." 830 P.2d at 296. However, Judge Jackson's dissent points out that the trial court never used Rule 37(b) of the Utah Rules of Civil Procedure as a justification for excluding the witnesses, and that it is just as conceivable that the trial court decided to exclude the witnesses because plaintiffs had proceeded in bad faith in preparing for trial. 830 P.2d at 298.

Likewise, in the instant case, Plaintiffs should have been sanctioned for their bad faith and not because of any particular violation of Rule 37(b). Moreover, in the instant case, it would not have been necessary to exclude the entire testimony of Pia and Deckert. Rather, Pia and Deckert should have been allowed to testify, but Exhibits 91P and 98P should have been excluded and Pia and Deckert should not have been allowed to testify in regard to these two exhibits. This would have been an appropriate sanction by the trial court, and would not have run afoul of the majority decision in Berrett.

D. If rescission is denied, the Judgment of the trial court should be reversed and remanded with directions to enter Judgment that Doms suffered $166,050.00 in damages as a result of the encumbrances on Rossi Hills.

In Gillmor v. Gillmor, 745 P.2d 461 (Utah App. 1987), *cert. denied*, 765 P.2d 1278 (Utah 1988), this Court held that there must be a "reasonable basis in the evidence" to affirm a trial court's award of damages. 745 P.2d at 462. In the instant case, the trial court arbitrarily cut the amount of damages found by Webber in half, and ruled that Doms had suffered $83,000.00 in damages rather than $166,050.00 (C. of L. 19; Judg. ¶ 4). The trial court improperly considered the inappropriate, irrelevant valuations of Rossi Hills by Pia (F. of F. 29), which should have been completely disregarded because Pia's opinions were based on assumptions and conditions not permitted by law. Therefore, the trial court's award of damages should be reversed because there is no reasonable basis in the evidence to support it.

POINT IV

THE TRIAL COURT ERRED BY RULING THAT DOMS' COUNTERCLAIM AGAINST THE ESTATE OF D.C. ANDERSON, AS IT RELATES TO THE REMEDY OF DAMAGES, IS TIME-BARRED BY THE PROBATE "NONCLAIM" PROVISIONS OF U.C.A. §§ 75-3-801 AND 75-3-803.

A. Doms' causes of action against the Estate of D.C. Anderson are not "claims" under the Uniform Probate Code, and therefore need not have been filed against the estate.

Point IV. A of Doms' opening brief sets forth the law in Utah, as well as several other states with similar probate "nonclaim" statutes, that Doms' causes of action against Plaintiffs are not "claims" which were required to be filed against the Estate of D.C. Anderson under the Utah Uniform Probate Code. Utah case law is clear that a "claim," as defined in the Uniform Probate Code, only "refers to debts or demands against the decedent which might have been enforced in his lifetime, by personal actions for the recovery of money; and upon which only a money judgment could have been rendered." In re Estate of Sharp, 537 P.2d 1034, 1037 (Utah 1975) (emphasis added). Thus, the Sharp Court held that a claim for specific performance, which is an equitable claim, is not a creditor's claim subject to the time limitations for filing a "claim" against an estate. Id.

In Point IV of their response brief, Plaintiffs erroneously suggest that the holding in Sharp should be limited to claims for specific performance, since no Utah appellate court has had occasion to issue a direct ruling on other equitable claims such as rescission. Plaintiffs have attempted to set forth a narrow interpretation of the holding in Sharp which was clearly never intended by the Utah Supreme Court. Any cause of action which does not fall within the definition of a "claim" under the probate statutes, as defined by the Utah Supreme Court in Sharp, is not a "claim" and need not filed against an estate. There is no language in Sharp or

subsequent Utah case law which suggests that only an equitable claim for specific performance need not be filed against an estate.

Other states with similar probate nonclaim statutes have not limited equitable claims to claims for specific performance. For example, in Reed v. Sixth Judicial District Court, 341 P.2d 100 (Nev. 1959), the sole question presented for review was whether a claim for rescission and restitution is a "claim" under the probate nonclaim statute. 341 P.2d at 101. The executrix of the decedent's estate argued that a claim for rescission and restitution is a general money demand against the estate, and as such is barred by the nonclaim statute. Id. The Reed Court rejected this argument, and held that the rescission claim was not a claim against the property constituting the estate and need not have been filed under the nonclaim statute. Id.

Another example is provided by the case of Bank of California v. Connolly, 111 Cal. Rpt. 468 (Cal. App. 4 Dist. 1973), in which the Court defined "claim" under California's probate code exactly the same, word for word, as the Utah Supreme Court defined "claim" in Sharp, supra. 111 Cal. Rpt. at 482. Other states have also adopted this same definition, as it is apparent that this definition is uniformally recognized under many state probate codes. In Bank of California, the Court pointed out that since there was no indebtedness under a profit sharing agreement during the decedent's lifetime, the other parties to the agreement were not required to file creditor's claims against the estate under the nonclaim statute. 111 Cal. Rpt. at 482.

In the instant case, Doms sought rescission of the Rossi Hills transaction, which is clearly not a "claim" under the provisions of the Utah Uniform Probate Code. Plaintiffs erroneously argue that for a cause of action to fall outside the nonclaim statute, it must be "purely equitable" and one for which only equitable relief can be obtained. This limitation has never been adopted by the Utah Supreme Court and does not represent the law in Utah. However, even assuming, *arguendo*, that this definition should be applied, Doms was still not required to file his causes

of action against the estate. Doms' claims against Plaintiffs have always been "purely equitable" claims for rescission and restitution. The trial court's refusal to grant these claims forced Doms to seek his alternative remedy of damages, but did not change the equitable nature of Doms' rescission action.

Doms simply has never been a "creditor" of the Estate of D.C. Anderson. In order for Doms to be considered a creditor, D.C. Anderson must have owed a debt to Doms which could have been enforced during Anderson's lifetime, and upon which only a money judgment could have been rendered. Sharp, supra, at 537 P.2d 1037.

B. Notwithstanding a ruling that Doms' remedy of damages is subject to the nonclaim statute, Doms is still entitled to a set-off for the damages against the purchase price of Rossi Hills.

Even assuming, *arguendo*, that Doms was required to somehow file a damages claim against the Estate of D.C. Anderson under the probate nonclaim statutes, Doms is still entitled to a set-off against the purchase price of Rossi Hills for all such damages. In Point IV of their response brief, Plaintiffs reiterate the same erroneous arguments they make in Point II. C of their response brief. Doms has already clearly shown that Plaintiffs' arguments are without merit (see Point II. D of this reply brief, supra; Point IV. B of Doms' opening brief).

C. The general policies and purposes underlying the Utah Uniform Probate Code are irrelevant to a resolution of the issue now before this Court.

Plaintiffs, in another attempt to set up a smoke screen and divert this Court's attention from the real issue, cite two decisions by this Court which make statements regarding the general purposes and policies of the Utah Uniform Probate Code.[20] Although the general policies and purpose underlying the probate code are important, they simply have no relevance to a

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[20] Plaintiffs cite Dementas v. Estate of Tallas, 764 P.2d 628, 630 (Utah App. 1988); Quinn v. Quinn, 772 P.2d 979, 981 (Utah App. 1989).

determination of the issue before this Court. The only issue before this Court is whether or not Doms' remedy of damages constitutes a "claim" which had to be filed against the Estate of D.C. Anderson within the three-month filing limitation of the nonclaim statutes.

POINT V

THE TRIAL COURT ERRED BY REFUSING TO AWARD ATTORNEY'S FEES AND APPROPRIATE COSTS TO DOMS.

A. Doms is entitled to an award of reasonable attorney's fees and costs for sustaining his title to Rossi Hills against Plaintiffs' foreclosure and quiet title actions.

Point V. A of Doms' opening brief sets forth Utah law which entitles Doms to an award of reasonable attorney's fees and costs for having to sustain his title to Rossi Hills against Plaintiffs' foreclosure action in the main case (Civil No. 8339) and quiet title action in the tax sale case (Civil No. 10066).[21] In Point V of their response brief, Plaintiffs erroneously claim that this argument is raised for the first time on appeal. Plaintiffs are clearly mistaken. The issue of Doms' right to attorney's fees and costs for having to defend against Plaintiffs' foreclosure and quiet title actions was argued orally before the trial court on several occasions. In fact, the trial court made a legal ruling specifically in regard to this issue, which is mistakenly set forth as a Finding of Fact (see F. of F. 55).

Plaintiffs further argue that their foreclosure action does not attack Doms' title to Rossi Hills. Plaintiffs' argument is clearly in error, as they have misunderstood the nature and purpose of a foreclosure action. A successful foreclosure action would not simply result in the foreclosure of the trust deed and trust deed note as alleged by Plaintiffs, but rather would result in the foreclosure of all right, title and interest of Doms to Rossi Hills. Plaintiffs' foreclosure action therefore clearly assails and disputes the title of Doms.

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[21] See Forrer v. Sather, 595 P.2d 1306, 1308 (Utah 1979); Van Cott v. Jacklin, 226 P. 460, 463 (Utah 1924).

Plaintiffs also erroneously argue that the tax sale case did not assail or dispute Doms' title to Rossi Hills. This is not a good faith argument, since Count 2 of the tax sale case was an action to quiet title to Rossi Hills in the Plaintiffs, as against Doms and all other possible claimants. Plaintiffs' quiet title action was clearly an attack on Doms' title to Rossi Hills.

Plaintiffs next make the erroneous argument that Doms is not entitled to attorney's fees or costs for Plaintiffs' breach of the general warranty of title or quiet enjoyment of Rossi Hills, based upon Plaintiffs' mistaken assertion that "title" was not an issue and Doms did not try to establish that the abutting property owners had title to any part of Rossi Hills by virtue of the doctrine of boundary by acquiescence. This argument has already been shown to be without merit in Point I. D. of this reply brief, supra.

Plaintiffs mistakenly rely on Espinoza v. Safeco Title Insurance Co., 598 P.2d 346, 348 (Utah 1979), as the trial court likewise mistakenly relied on George A. Lowe Co. v. Simmons Warehouse Co., 39 Utah 395, 117 P. 874 (1911) (see F. of F. 55). These two cases simply hold that the grantee is not entitled to attorney's fees in an action directly against the grantor for breach of the covenant against encumbrances. However, in the instant case, Doms is entitled to attorney's fees and costs because Plaintiffs' foreclosure and quiet title actions are separate actions which entitle Doms to attorney's fees and costs. The fact that Plaintiffs themselves, rather than a third party, have attacked Doms' title makes Doms' right to attorney's fees and costs *a fortiori*.

B. Doms is entitled to an award of his out-of-pocket attorney's fees as consequential damages flowing from Plaintiffs' breach of contract.

Point V. B of Doms' opening brief argues that Doms is entitled to his out-of-pocket attorney's fees as consequential damages under the rationale of Canyon Country Store v. Bracey, 781 P.2d 414, 420 (Utah 1989). Doms acknowledges that this Court's recent decision in Collier v. Heinz, 827 P.2d 982 (Utah App. 1992), holds that Bracey is only applicable to insurance

contract cases. Doms respectfully submits that Collier is in error on this particular issue. Doms is preserving this issue for potential review by the Utah Supreme Court on petition for writ of certiorari.

C. Doms is entitled to an award of appropriate costs, including costs of depositions.

On page of 42 of their response brief, Plaintiffs argue that Doms is not entitled to any further award of costs because he is not the prevailing party on any of his causes of action in his Second Amended Counterclaim. This argument was incessantly made by Plaintiffs to the trial court, and is not made in good faith. Doms' first cause of action in his Counterclaim is for Plaintiffs' breach of the covenants and warranties in the warranty deed, and the remedy sought by Doms is rescission or, in the alternative, damages. Although the trial court denied Doms' remedy of rescission, the trial court entered Conclusions of Law stating that Doms' remedy is for breach of the statutory covenants of warranty in the warranty deed, and that Doms suffered $83,000.00 as a result of said breach by Plaintiffs (see C. of L. 10, 19). Plaintiffs are well aware of this fact, and their argument in regard to this issue is simply not made in good faith.

As discussed in Point V. E of Doms' opening brief, the trial court awarded Doms the paltry amount of $101.50 in costs, and did not award any costs for the depositions of Plaintiffs. Plaintiffs argue on page 42 of their response brief that "it does not appear that any of the depositions Doms took were utilized by Doms at the time of trial." This statement is false. The depositions of Dan Scott (R. 2724), Jeanne Scott (R. 2725), and Ellen Anderson (R. 2726) were utilized at trial and were absolutely necessary to establish facts proving that the word "special" was not typed on the warranty deed when it was executed and delivered by Plaintiffs; and facts regarding Plaintiffs' knowledge of the encroachments on Rossi Hills and their failure to attempt to remedy them or otherwise mitigate damages (see F. of F. 4, 14, 15, 16). These depositions were essential for the development of Doms' case, and should be taxable as costs.

POINT VI

THE TRIAL COURT ERRED IN ITS AWARD OF ATTORNEY'S FEES AND COSTS TO PLAINTIFFS.

A. Plaintiffs are not entitled to any attorney's fees or costs incurred in Civil No. 8339, the main case.

Point VI. A of Doms' opening brief sets forth clear Utah law which establishes that Plaintiffs have absolutely no legal basis whatsoever to claim an award of attorney's fees or costs in the instant case.

In Point VI. A of their response brief, Plaintiffs inaccurately assert that Doms "acknowledges" Plaintiffs' right to attorney's fees and costs if Doms was in default under the trust deed and trust deed note. Plaintiffs must not have read Point VI. A of Doms' opening brief. On page 51, Doms sets forth three consistent decisions by the Utah Supreme Court which clearly establish that even if Doms were determined to be in default under the trust deed and trust deed note, Plaintiffs still would not be entitled to recover any attorney's fees or costs for defending against the causes of action in Doms' Counterclaim, even if Plaintiffs were successful in foreclosing against Rossi Hills.[22] In their response brief, Plaintiffs have misrepresented the holding of the Utah Supreme Court in Stubbs. The Stubbs Court held that a vendor who successfully brought a foreclosure action against the purchasers could not recover attorney's fees incurred in defending against a counterclaim, especially where the defense was unsuccessful. 567 P.2d at 171.

Any doubt as to the holding in Stubbs was dispelled in the subsequent decisions of Utah Farm Production Credit Ass'n v. Cox and Trayner v. Cushing, supra. In Cox, the Utah Supreme

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[22] See Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984); Utah Farm Production Credit Ass'n v. Cox, 627 P.2d 62, 66 (Utah 1981); Stubbs v. Hemmert, 567 P.2d 168, 171 (Utah 1977).

Court directly held as follows: "In the case of *Stubbs v. Hemmert*, this Court ruled that the plaintiff was not entitled to reimbursement for fees he had incurred in defending a counterclaim in a foreclosure action." 626 P.2d at 66. This interpretation of the rule enunciated in Stubbs was subsequently reiterated in Trayner. 688 P.2d at 858, note 6.

Plaintiffs next make the argument that they are entitled to attorney's fees based upon Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). This argument is based upon the false assertion that Doms was unsuccessful on his Second Amended Counterclaim, and the unbelievable assertion that "Doms has been stubbornly litigious in the instant case, just as the defendants were in Dixie State Bank." Plaintiffs' assertion that Doms has been "stubbornly litigious" is false. Beginning in the summer of 1988, after the default judgment against Doms was set aside, Plaintiffs buried the trial court and Doms in an avalanche of paper for over four years. This Court can have its staff review the record and make its own determination as to which side has been "stubbornly litigious."

Plaintiffs' comparison of Doms' conduct to that of the defendants in Dixie State Bank is not a good faith argument. In that case, the defendants attempted to take advantage of a bank computer error by not making payments on a bank loan for a truck they had purchased. When the bank discovered the error, the defendants refused to make all of the required payments, and the bank repossessed the truck and sold it at private sale pursuant to published notice. The defendants were high bidders at the sale and bought their truck back, leaving a substantial deficiency. The defendants refused to pay the deficiency, and the bank was forced to commence an action to recover the balance still owing on the loan. The bank also sought an award of attorney's fees based upon provisions in the original note and security agreement. 764 P.2d at 986.

The defendants filed numerous frivolous motions to dismiss, and a frivolous counterclaim demanding, among other things, punitive damages against the bank of at least $200,000.00. Numerous depositions were noticed up and taken and extensive discovery was completed by the parties. Id. at 986-87.

Shortly before trial, the defendants entered into a stipulation and settlement with the bank, which entitled the bank to judgment in the full amount owing on the loan plus attorney's fees in an amount found reasonable by the court, and the defendants' counterclaim was dismissed in its entirety. Id. at 987.

It is readily apparent that the conduct of the defendants in Dixie State Bank cannot in good faith be compared to the conduct of Doms in the instant case. Plaintiffs have misrepresented the decision in Dixie State Bank as "authority" for an attorney's fees award to Plaintiffs in the instant case. On the contrary, Dixie State Bank provides no authority whatsoever for such an award to Plaintiffs.

Doms points out on page 51 of his opening brief that "Plaintiffs' counsel either admitted in their affidavits or in their testimony at the hearing on attorney's fees that all of their requested fees were incurred defending against Doms' Second Amended Counterclaim in the main case." Although this statement is followed by extensive citations to exhibits and testimony in the record, Plaintiffs assert on page 47 of their response brief that this statement "is absolutely false!" Plaintiffs are mistaken in their bold assertion. Pages 10-14 of McIntosh's attorney's fee affidavit establish that none of McIntosh's billings to his clients reflect services rendered in regard to prosecuting the foreclosure action (Attorney's Fees Ex. 3P; R. 5903-07). McIntosh also testified that he was contacted by Biele to represent Ellen Anderson and Jeanne Scott personally because they were brought into the case by Doms' Second Amended Counterclaim and that he then represented them in defending against the Counterclaim (R. 6418). McIntosh further admitted

under cross-examination that none of his billings differentiate which fees were expended on the foreclosure action versus fees expended in defense of the Counterclaim (R. 6433).

Furthermore, none of the attorney's fees set forth in Biele's affidavit were expended in prosecution of the foreclosure complaint (Attorney's Fees Ex. 5P). Biele admitted under cross-examination that all of the amounts claimed as attorney's fees in his affidavit were in defense of Doms' Second Amended Counterclaim (R. 6383-84).

B. Plaintiffs are not entitled to any attorney's fees or costs incurred in Civil No. 10066, the tax sale case.

Point VI. B of Doms' opening brief establishes the reasons why Plaintiffs are not entitled to any attorney's fees or costs in the tax sale case. As in the main case, Plaintiffs' only possible claim for attorney's fees and costs in the tax sale case is based upon an alleged default by Doms under the trust deed and trust deed note. Since Doms was never in such default, Plaintiffs have absolutely no legal basis to claim attorney's fees or costs. Doms further points out in his opening brief that it was unconscionable for Plaintiffs to even request attorney's fees and costs in regard to the tax sale case, and that the only party who could possibly be held responsible for the alleged attorney's fees incurred by Plaintiffs in the tax sale case would be Summit County, not Doms.

In truth, the tax sale case was a completely frivolous and unnecessary lawsuit filed by Plaintiffs to attempt to prevent Doms from rescinding the Rossi Hills transaction and to cloud Doms' title; to needlessly run up the cost of the litigation and to harass Doms; and to complicate and delay the issues in the main case. Plaintiffs attempt to justify the tax sale case by claiming that their trust deed was extinguished at the Summit County tax sale under the rationale of Hanson v. Burris, 46 P.2d 400 (Utah 1935), *affirmed*, Ingrahm v. Hanson, 297 U.S. 378 (1936).

The general rule enunciated in Hanson is that all liens against property sold at tax sale are extinguished if the property is purchased by a third-party bona fide purchaser. However, the Utah Supreme Court has long recognized an exception to this general rule. In Tuft v. Federal Leasing, 657 P.2d 1300, 1303 (Utah 1982), citing its previous decision in Hadlock v. Benjamin Drainage District, 53 P.2d 1156 (Utah 1936), the Court stated that the law is well-settled that "one who is under a duty to pay taxes cannot add to or strengthen his title by purchasing the land at tax sale."[23] The Tuft Court further held that when looking at a tax sale, one must "look at the substance of the transaction rather than its form." 657 P.2d at 1303. The Court ultimately held that the "so-called purchase at tax sale . . . constituted nothing more than payment of the taxes, or a redemption by the owners. As a necessary consequence, plaintiffs' interest in the property was not defeated by the tax sale." (footnote omitted and emphasis added). Id.

This is similar to what happened in the instant case. Doms "purchased" the property sold at the tax sale to Summit County in 1987 by paying all of the delinquent taxes, interest, penalties, costs and the 1988 estimated taxes. The Utah Supreme Court has made it clear that this type of "purchase" actually constitutes a "redemption" of the property. See Salt Lake Home Builders, Inc. v. Colman, 518 P.2d 165 (Utah 1974).

Therefore, under clear Utah law, Plaintiffs' trust deed was not extinguished by the tax sale and subsequent redemption by Doms, and Plaintiffs had a valid lien against Rossi Hills at the time they filed the tax sale case. Under Utah law, Doms could not strengthen his title and extinguish the security interest of Plaintiffs by redeeming the property from Summit County. Counsel for Doms pointed this out to counsel for Plaintiffs on several occasions, even prior to December of 1988 when Plaintiffs filed the tax sale case (R. 6537-38). Nevertheless, Plaintiffs

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[23] See also Dillman v. Foster, 656 P.2d 974 (Utah 1982); Crofts v. Johnson, 313 P.2d 808 (Utah 1957); Free v. Farnworth, 144 P.2d 532 (Utah 1943).

filed the tax sale case for the inappropriate reasons set forth above, claiming that the tax sale was unconstitutional.

Plaintiffs' assertions in Point VI. B of their response brief that Doms "resisted every effort to stipulate that the sale could be set aside" and that "Doms required Plaintiffs to conduct extensive discovery" are absolutely false. At no time did Plaintiffs ever request Doms to enter into a stipulation to set aside the tax sale. Rather, Plaintiffs steadfastly argued that the tax sale was unconstitutional and continued conducting full discovery. Plaintiffs continued to argue against their own interest for several years by claiming that they had lost their lien against Rossi Hills when Doms was willing to concede all along that Plaintiffs had not lost their lien. The only reason Plaintiffs took this course of action was so they could file the frivolous, unmeritorious tax sale case in an attempt to stop rescission of the Rossi Hills transaction. It would simply be unconscionable to award Plaintiffs any attorney's fees or costs for any expense incurred in the tax sale case.

C. Plaintiffs are not entitled to any attorney's fees or costs incurred in their two Petitions to the Utah Supreme Court.

Subpoints C and D of Point VI of Doms' opening brief clearly establish that the trial court erred in awarding any attorney's fees or costs to Plaintiffs for their Petitions for an Interlocutory Appeal and for an Extraordinary Writ to the Utah Supreme Court. Plaintiffs lost on both of these petitions and cannot make a legitimate claim for attorney's fees or costs. In their response brief, Plaintiffs have not even attempted to justify the attorney's fee awards made by the trial court for Plaintiffs' two petitions to the Utah Supreme Court. Doms submits that there is no justification for these awards by the trial court, and the trial court committed clear legal error in making these awards.

D. Plaintiffs are not entitled to any attorney's fees or costs pursuant to their motions for sanctions in regard to Doms' objections to discovery requests.

Point VI. E of Doms' opening brief sets forth with particularity the reasons why Plaintiffs are not entitled to any attorney's fees or costs pursuant to their motions for sanctions in regard to their discovery requests. In Point VI. C of their response brief, Plaintiffs argue that they are entitled to all of their claimed attorney's fees in regard to their discovery requests because of "[t]he frivolous grounds for the objections and the stubbornness of Doms in refusing to respond to these legitimate discovery requests."

Plaintiffs' assertions are erroneous and belie the actual facts. Many of Plaintiffs' requests were not "legitimate." Consequently, Doms made full or partial objections to these requests on the grounds they were not relevant to the subject matter of the pending action; not reasonably calculated to lead to the discovery of admissible evidence; and they constituted harassment, annoyance, oppression, and would create an undue burden or expense.[24]

Plaintiffs further argue in their response brief that "Doms filed a flurry of frivolous motions disagreeing with Judge Frederick on every point and requesting an inordinate amount of relief." This is another baseless, false and self-serving statement by Plaintiffs. These so-called "frivolous motions" are set forth on page of 57 of Doms' opening brief, and this Court is invited to examine and compare them to Plaintiffs' accusations. These motions were legitimate and well-founded in both law and fact.

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[24] The Court is referred to Doms' Memorandum in Opposition to Plaintiffs' Motion for Sanctions, dated May 6, 1989 (R. 1574-1674), for a thorough discussion of the inappropriate and improper discovery requests made by Plaintiffs.

E. Doms is entitled to a refund of a substantial amount of the attorney's fees and costs paid to Plaintiffs as a condition of the trial court setting aside the default judgment.

Point VI. F of Doms' opening brief sets forth the facts and the law which establish that Doms is entitled to a substantial refund of the $4,467.60 he paid to Plaintiffs as a condition of the trial court setting aside the default judgment. Plaintiffs have not responded to this issue in their response brief.

CONCLUSION

Based upon the arguments set forth in this reply brief, and upon the arguments set forth in Doms' opening brief, Doms requests that this Court reverse the Judgment of the trial court and grant the relief requested in the Conclusion of Doms' opening brief, set forth on pages 74-75 of said brief.

DATED this 26th day of May, 1994.

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CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing were mailed, by first class postage prepaid, on this 26th day of May, 1994, to:

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